

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RICARDO RIVERA,)	CASE NO. CV 08-08460 VAP (RZ)
)	
Petitioner,)	
)	ORDER TO SHOW CAUSE
vs.)	
)	
MICHAEL A. SMELOSKY, Warden,)	
)	
Respondent.)	

The Court issues this Order To Show Cause directed to Plaintiff because the face of the petition suggests that the action may be time-barred.

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a portion of which established a one-year statute of limitations for bringing a habeas corpus petition in federal court. 28 U.S.C. § 2244(d). In most cases, the limitations period commences on the date a petitioner's conviction became final. *See* 28 U.S.C. § 2244(d)(1). The limitations period will start instead on one of the following dates, whichever is latest, if any of them falls after April 24, 1997: the date on which a State-created impediment – itself a violation of constitutional law – was removed; the date on which a newly-recognized constitutional right was established; or the date on which the factual predicate for the claims could have been discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1).

1 The time spent in state court pursuing collateral relief in a timely manner is
 2 excluded, *see* 28 U.S.C. § 2244(d)(2), and the courts have held that the statute also is
 3 subject to equitable tolling. *See Harris v. Carter*, 515 F.3d 1051, 1054 n.5 (9th Cir. 2008).

4 Petitioner, who is represented by counsel, filed the current petition on
 5 December 22, 2008. From the face of the petition and from judicially-noticeable materials,
 6 the Court discerns that –

- 7 (a) On September 25, 1996, a Los Angeles County jury convicted Petitioner of
 8 first degree murder and other charges, resulting in a prison sentence of 29
 9 years to life. Pet. ¶¶ 1-2.
- 10 (b) Petitioner appealed, but the California Court of Appeal affirmed in an opinion
 11 filed on March 19, 1998. Petitioner did not seek further direct review. *See*
 12 Pet. ¶¶ 3-4.
- 13 (c) Petitioner's conviction therefore became final after June 17, 1998, when the
 14 Supreme Court's 90-day deadline for filing a certiorari petition expired. *See*
 15 SUP. CT. R. 13.1. Petitioner's 365-day limitations period for the present
 16 action started on that date.
- 17 (d) Eight and a half years passed. In January 2007, Petitioner began a series of
 18 state habeas corpus petitions in the trial, state appellate and state supreme
 19 courts, all of which courts rejected relief. *See* Pet. ¶ 7. The California
 20 Supreme Court denied the final such petition on April 30, 2008. *See* Pet. ¶ 6.

21 * * * * *

22 Unless this Court has miscalculated the limitations period, or some form of
 23 additional tolling applies in sufficient measure, this action is time-barred. His limitations
 24 period appears to have expired in June 1999. Petitioner's commencement of state habeas
 25 proceedings many years thereafter cannot rejuvenate his stale claim. *Green v. White*, 223
 26 F.3d 1001, 1003 (9th Cir. 2000). No basis appears in the petition for a later AEDPA-
 27 limitations-period starting date. Nor does the face of the petition disclose any basis for
 28 equitable tolling. *See Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 161

1 L. Ed. 2d 669 (2005) (equitable tolling of AEDPA statute requires petitioner to show
2 “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary
3 circumstance stood in his way”), *quoted in Harris, supra*, 515 F.3d at 1054-55.

4 This Court may raise *sua sponte* the question of the statute of limitations bar,
5 so long as it gives Petitioner an opportunity to be heard on the matter. *Herbst v. Cook*, 260
6 F.3d 1039 (9th Cir. 2001). Accordingly, Petitioner shall show cause why this action should
7 not be dismissed as being barred by the statute of limitations. Petitioner shall file his
8 response to the Court’s Order to Show Cause not later than 21 days from the filing date of
9 this Order.

10 If Petitioner does not file a response within the time allowed, the action may
11 be dismissed for failure to timely file, and for failure to prosecute.

12 IT IS SO ORDERED.

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14 DATED: January 6, 2009

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19 RALPH ZAREFSKY
20 UNITED STATES MAGISTRATE JUDGE
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